



July 27, 2001

Ms. Lynn Rossi Scott
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OR2001-3258

Dear Ms. Scott:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 149416.

The Grand Prairie Independent School District (the "district"), which you represent, received a request for "Barbosa's Bulletin since January 2001, a 2000-2001 employee directory and lists of all district employees including their full names, title, date of birth, date hired, salary and incentive pay." You explain that "Barbosa's Bulletin" is a weekly communication between the district's superintendent and district school board members. You indicate that you will release most of the requested information to the requestor. You claim, however, that some of the requested information is excepted from disclosure under sections 552.101, 552.103, 552.105, 552.107, 552.108, 552.111, 552.114, and 552.117 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

First, you state that you will provide the requestor with a copy of the 2000-2001 directory, but that you will redact the addresses and telephone numbers of those employees who have requested that this information not be disclosed under section 552.117 of the Government Code. Section 552.117 excepts from disclosure the home address and telephone number, social security number, and family member information of a current or former official or employee of a governmental body who requests that this information be kept confidential under section 552.024. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See Open Records Decision No. 530 at 5 (1989)*. Therefore, the district may only withhold information under section 552.117 on behalf of a current or former official or employee who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was received. For any employee who timely elected to keep his or her personal information confidential, the district

must withhold the employee's home address and telephone number, social security number, and any information that reveals whether the employee has family members. The district may not withhold this information under section 552.117 for an employee who did not make a timely election to keep the information confidential. We have marked the type of information in the submitted documents that is excepted from disclosure under section 552.117 if the employee has made a timely election under section 552.024.

Second, you contend that portions of the submitted information are excepted under section 552.111 of the Government Code. Section 552.111 excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. An agency's policymaking functions do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. Open Records Decision No. 615 at 5-6 (1993). Additionally, section 552.111 does not generally except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Id.* at 4-5. We agree that some of the information you seek to withhold is protected under section 552.111. However, the remaining information you seek to withhold under this exception consists of facts, or internal administrative or personnel matters; section 552.111 does not except those portions from required public disclosure. We have marked the information the district may withhold under section 552.111.

Third, you contend that portions of the submitted documents are excepted under section 552.103 of the Government Code. Section 552.103 provides as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

....

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). Section 552.103 was intended to prevent the use of the Act as a method of avoiding the rules of discovery in litigation. Attorney General Opinion JM-048 at 4 (1989). The litigation exception enables a governmental body to protect its position in litigation by requiring information related to the litigation to be obtained through discovery. Open Records Decision No. 551 at 3 (1990). To show that the litigation exception is applicable, the district must demonstrate that (1) litigation was pending or reasonably anticipated at the time of the request and (2) the information at issue is related to that litigation. *See* Gov't Code § 552.103(a), (c); *see also* *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990).

You state that the district is currently a defendant in a pending lawsuit filed by a district employee in the 116th Judicial District Court of Dallas County. You further state that portions of the submitted documents relate to "the status of settlement negotiations" in this lawsuit and to "the administration's and the attorneys' opinions regarding potential future liability." Based on your arguments and our review of the submitted information, we conclude that you have made the requisite showing that portions of the submitted documents, which we have marked, relate to litigation that was pending on the day that the request was received and may therefore be withheld from disclosure under section 552.103(a).

We note that if the opposing party in the litigation has seen or had access to any of the information in these records, there is no section 552.103(a) interest in withholding that information from the requestor. Open Records Decision Nos. 349 (1982), 320 (1982). In addition, the applicability of section 552.103(a) ends once the litigation concludes. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

Fourth, you argue that portions of the submitted documents contain confidential attorney-client communications that are excepted from disclosure under sections 552.101, 552.103, and 552.107 of the Government Code.¹ Section 552.107(1) of the Government Code excepts information "that the attorney general or an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Texas Rules of Civil Evidence, the Texas Rules of Criminal Evidence, or the Texas Disciplinary Rules of Professional Conduct[.]" While section 552.107(1) appears to apply to information within rule 1.05 of the Texas Disciplinary Rules of Professional Conduct, this office has determined that section 552.107 cannot be applied as broadly as written to information in the possession of an attorney for a governmental body. Open Records Decision No. 574 (1990). Section 552.107(1) was found to protect only the attorney's communication

¹We note that in Open Records Decision No. 574 (1990), this office determined that the statutory predecessor to section 552.107(1) was the appropriate section for a governmental body to cite when seeking to except from required public disclosure communications between the governmental body and its legal counsel.

of legal advice or opinion to the client and communications from a client to an attorney where those communications are made in confidence and in furtherance of the attorney rendering professional legal service to the governmental body. *Id.* at 5. Moreover, section 552.107(1) does not except purely factual information from disclosure. *Id.* We determine the applicability of section 552.107(1) on a case-by-case basis. We agree that portions of the submitted information, which we have marked, reflect either client confidences or an attorney's legal advice or opinions that the district may withhold under section 552.107.

You also argue that the submitted documents contain attorney work product that is excepted from disclosure under sections 552.101, 552.103, and 552.107 of the Government Code. We note that the appropriate exception to claim with respect to attorney work product is section 552.111 of the Government Code. A governmental body may withhold attorney work product from disclosure under section 552.111 if it demonstrates that the material was (1) created for trial or in anticipation of civil litigation, and (2) consists of or tends to reveal an attorney's mental processes, conclusions, and legal theories. Open Records Decision No. 647 (1996). As you have not made arguments relevant to either prong of the work product test, we cannot conclude that any portion of the submitted documents is protected by section 552.111 and the work product privilege.

Fifth, you contend that portions of the submitted documents consist of confidential medical information that must be withheld under section 552.101 of the Government Code in conjunction with the Medical Practice Act (the "MPA"), chapter 159 of the Occupations Code. Section 552.101 of the Government Code protects "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Accordingly, section 552.101 encompasses confidentiality provisions such as those found in the MPA. The MPA provides in relevant part:

- (b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.
- (c) A person who receives information from a confidential communication or record as described by this chapter . . . may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

The MPA requires that any subsequent release of medical records be consistent with the purposes for which a governmental body obtained the records. Open Records Decision No. 565 at 7 (1990). Thus, the MPA governs access to medical records. Open Records Decision No. 598 (1991). Moreover, information that is subject to the MPA includes both medical records and information obtained from those medical records. *See* Occ. Code § 159.002(a), (b), (c).

The submitted documents do not appear to have been created or maintained by a physician. Moreover, you do not state, and there is no indication on the documents themselves, that any of the submitted information was obtained from medical records. Therefore, we find that no portion of the submitted information is subject to the MPA.

Sixth, you contend that portions of the submitted documents are excepted under section 552.101 in conjunction with common law privacy. Section 552.101 of the Government Code also incorporates the doctrine of common law privacy. For information to be protected from public disclosure under common law privacy, the information must meet the criteria set out in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Information may be withheld from the public when (1) it is highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *Id.* at 685; Open Records Decision No. 611 at 1 (1992).

This office has concluded that common law privacy protects some kinds of medical information or information indicating disabilities or specific illnesses. *See* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). We are unable to conclude that any portion of the submitted information is excepted from disclosure under section 552.101 of the Government Code in conjunction with common law privacy.

Seventh, you assert that portions of the submitted documents are excepted under section 552.108 of the Government Code. Section 552.108, the "law enforcement exception" applies to certain information held by a law enforcement agency or prosecutor. Gov't Code § 552.108. The district is neither a law enforcement agency nor a prosecutor. While you state that release of information regarding bomb threats would interfere with future prosecution and detection of bomb threats by the Grand Prairie Police Department, this office has not been provided with any representation from the Grand Prairie Police Department indicating that the release of the information would interfere with the detection, investigation, or prosecution of crime. *See, e.g.,* Open Records Decision Nos. 474 (1987), 372 (1983); *see also* Open Records Decision No. 586 (1991). Therefore, the district may not withhold the information regarding bomb threats under section 552.108 of the Government Code.

You also state that a criminal case is pending regarding a named teacher. Section 552.108(a)(1) excepts from disclosure information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime if release of the information would interfere with the detection, investigation, or prosecution of crime. We note that where an incident involving allegedly criminal conduct is still under active investigation or prosecution, section 552.108 may be invoked by any proper custodian of information which relates to the incident. *See* Open Records Decision Nos. 474 (1987), 372 (1983); *see also* Open Records Decision No. 586 (1991) (need of another governmental body to withhold requested information may provide compelling reason for nondisclosure under section 552.108).

This office has been provided with a letter from the McLennan County Criminal District Attorney requesting that information in the district's custody regarding this ongoing criminal investigation and prosecution be withheld from disclosure. Based on these representations and our review of the submitted information, we agree that release of the submitted information regarding the named teacher would interfere with the detection, investigation, or prosecution of crime. Accordingly, we have marked those portions of the submitted information that may be withheld under section 552.108.

Eighth, you contend that a particular excerpt from the submitted documents is excepted under section 552.105 of the Government Code. Section 552.105 of the Government Code excepts from disclosure information relating to:

- (1) the location of real or personal property for a public purpose prior to public announcement of the project; or
- (2) appraisals or purchase price of real or personal property for a public purpose prior to the formal award of contracts for the property.

Gov't Code § 552.105. Section 552.105 protects a governmental body's planning and negotiating position with respect to particular transactions. *See* Open Records Decision No. 564 at 2 (1990). This exception protects information relating to the location, appraisal, and purchase price of property until the transaction is either completed or canceled. *See* Open Records Decision Nos. 357 at 3 (1982), 310 at 2 (1982). A governmental body may withhold information "which, if released, would impair or tend to impair [its] 'planning and negotiating position in regard to particular transactions.'" *See* ORD 357 at 3 (quoting Open Records Decision No. 222 (1979)). The question of whether specific information, if publicly released, would impair a governmental body's planning and negotiation position in regard to particular transactions is a question of fact. Accordingly, this office will accept a governmental body's good faith determination in this regard, unless the contrary is clearly shown as a matter of law. *See* Open Records Decision No. 564 (1990).

You state that the excerpt at issue here "relates to the location as well as the proposed price of a piece of real property owned by the District, prior to the announcement of the project or the formal award of contracts for the property." You do not state, however, that release of this information would impair the district's planning or negotiating position with respect to a particular transaction. Further, our review of the excerpt indicates that it does not relate to the district's purchase or sale of real property. In addition, contrary to your assertion, the excerpt does not contain an indication of a proposed price. Therefore, we cannot conclude that release of the excerpt at issue would damage the district's planning or negotiating position with respect to the purchase or sale of real property. Upon careful review of your representations and the submitted information, we believe that you have not demonstrated the applicability of section 552.105 of the Government Code to the excerpt at issue. Therefore, the district may not withhold this excerpt under section 552.105.

Finally, you claim that portions of the submitted information are excepted from disclosure under sections 552.026, 552.101, 552.114 and the federal Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g. Section 552.026 of the Government Code provides as follows:

This chapter does not require the release of information contained in education records of an educational agency or institution, except in conformity with the Family Educational Rights and Privacy Act of 1974, Sec. 513, Pub. L. No. 93-380, 20 U.S.C. Sec. 1232g.

Gov't Code § 552.026. FERPA provides that no federal funds will be made available under any applicable program to an educational agency or institution that releases personally identifiable information, other than directory information, contained in a student's education records to anyone but certain enumerated federal, state, and local officials and institutions, unless otherwise authorized by the student's parent. *See* 20 U.S.C. § 1232g(b)(1); *see also* 34 C.F.R. § 99.3 (defining personally identifiable information). "Education records" are those records that contain information directly related to a student and that are maintained by an educational agency or institution or by a person acting for such agency or institution. *See* 20 U.S.C. § 1232g(a)(4)(A).

Section 552.114 of the Government Code requires the district to withhold "information in a student record at an educational institution funded wholly or partly by state revenue." Gov't Code § 552.114(a). This office generally has treated "student record" information under section 552.114 as the equivalent of "education record" information that is subject to FERPA. *See* Open Records Decision No. 634 at 5 (1995).

In Open Records Decision No. 634 (1995), this office concluded that (1) an educational agency or institution may withhold from public disclosure information that is protected by FERPA and excepted from required public disclosure by sections 552.026 and 552.101 without the necessity of requesting an attorney general decision as to those exceptions, and (2) an educational agency or institution that is state-funded may withhold from public disclosure information that is excepted from required public disclosure by section 552.114 as a "student record," insofar as the "student record" is protected by FERPA, without the necessity of requesting an attorney general decision as to that exception.

Information must be withheld from required public disclosure under FERPA only to the extent "reasonable and necessary to avoid personally identifying a particular student." *See* Open Records Decision Nos. 332 (1982), 206 (1978). We have marked the types of information in the submitted documents that may reveal or tend to reveal information about a student that must be withheld pursuant to FERPA.

To summarize: (1) for any employee who timely elected to keep his or her personal information confidential, the district must withhold the employee's home address and telephone number, social security number, and any information that reveals whether the employee has family members; (2) we have marked the information that the district

may withhold under section 552.111; (3) we have marked the information that the district may withhold under section 552.103(a); (4) we have marked the information that the district may withhold under section 552.107(1); (5) we have marked the information that the district may withhold under section 552.108; and (6) we have marked the types of information in the submitted documents that may reveal or tend to reveal information about a student that must be withheld pursuant to FERPA. The remaining unmarked information must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in cursive script, reading "Karen A. Eckerle".

Karen A. Eckerle
Assistant Attorney General
Open Records Division

KAE/sdk

Ref: ID# 149416

Enc: Marked documents

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